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In the Supreme Court of the United States

OCTOBER TERM, 1993

LOUIS DREYFUS CORPORATION AND
UNITED STATES FIRE INSURANCE COMPANY
PETITIONERS

VERSUS

DAVIS EBANKS, JR., ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) The criteria for determining vessel status under § 905(b) of the Longshore and Harbor Worker's Compensation Act.

2) Whether a structure whose primary purpose is to function as a stationary work platform and not provide any navigational or transportation functions is not a §905(b) vessel as a matter of law.

3) Whether the term "vessel" should have a uniform meaning under the Jones Act and §905(b) of the Longshore and Harbor Workers' Compensation Act.

LISTS OF PARTIES

Petitioner, United States Fire Insurance Company, provides certain insurance coverage to its insured, petitioner, Louis Dreyfus Corporation. Respondants, Davis and Lisa Ebanks, seek to recover damages from Louis Dreyfus Corporation and its insurer, United States Fire Insurance Company, as a result of an alleged slip and fall accident which occurred on a structure the status of which is at issue. Petitioners, Louis Dreyfus Corporation and United States Fire Insurance Company, submit that the structure involved was not a §905(b) vessel under the Longshore and Harbor Workers' Compensation Act 33 U.S.C. §901 *et seq.* as a matter of law. Consequently, the Louisiana Supreme Court erred in reversing the decisions of the trial and appellate courts.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Opinions Below ix

Jurisdictaion x

Constitutional Provision xi

Statement of the Case 1

Reasons for Granting the Writ 5

I. Introduction 5

II. The Only Issue Presented is §905(b) Vessel Status 5

III. The Question of §905(b) Vessel Status May Be And Was Properly Decided By Summary Judgment 8

IV. Precedent Estsablishes That The Structure Involved Was Not A §905(b) Vessel 11

TABLE OF CONTENTS (continued)

Page

V. A vessel Is A Vessel For All Purposes 20

Conclusion 23

Certificate 24

APPENDIX

Judgment of Trial Court A-1

Reasons of the Trial Court A-3

Appellate Court Decision A-6

Louisiana Supreme Court Decision A-13

Louisiana Supreme Court Decision Denying Rehearing A-14

TABLE OF AUTHORITIES

Cases **Page**

Billiot v. Great Lakes Dredge & Dock Co., 1993 U.S. Dist. LEXIS 11560, Civil Action Number 92-2813 "J" (E.D. La. June 29, 1993) 14,16,17

Buccellato v. City of New York, 808 F. Supp. 967 (E.D. N.Y. 1992) 21

Burks v. American River Transportation, 679 F.2d 69 (5th Cir. 1982) 12

Cathriner v. Unisea, Inc., 975 F.2d 657 (9th Cir. 1992) 22

Champagne v. M/V COVER STATION, 508 So.2d 881 (La. App. 5th Cir. 1987) 15,16,17

Cope v. Vallette Dry Dock Co., 119 U.S. 625, 7 S.Ct. 336, 30 L.Ed. 501 (1887) 17,18,20

Davis v. Cargill, Inc., 808 F.2d 361 (5th Cir. 1986) 9,12,13,16,17,

DiGiovanni v. Traylor Bros., Inc., 1992 A.M.C. 1521 (1st Cir. 1992) 21

Ducote v. V. Keeler & Co., Inc., 953 F.2d 1000 (5th Cir. 1992) 6,7,8

TABLE OF AUTHORITIES (continued)

Cases **Page**

Ducrepont v. Baton Rouge Marine Enterprises, Inc., 877 F.2d 393 rehearing en banc denied 885 F.2d 870 (5th Cir. 1989) 13,14,15,16,17

Ebanks v. Reserve Marine Enterprises, Inc., et. al. 620 So.2d 355 (La. App. 5th Cir. 1993) 4

Ebanks v. Reserve Marine Enterprises, Inc., et. al., 625 So.2d 1050 (La. 1993) 4

Ebanks v. Reserve Marine Enterprises, Inc., et. al., 627 So.2d 645 (La. 1993) ix

Evansville and Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19, 46 S. Ct. 379, 70 L.Ed. 805 (1926) 18,20

Griffith v. Wheeling Pittsburg Steel Corp., 521 F.2d 31 (3rd Cir. 1975) *cert. den.* 423 U.S. 1054 (1975) . . . 21

Hurst v. Pilings and Structures, Inc., 896 F.2d 504 (11th Cir. 1990) 22

Johnson v. Beasley Const. Co., 742 F.2d 1054 (7th Cir. 1984) *cert. den.* 469 U.S. 1211 (1985) 22

Lash v. Ballard Construction Co., 707 F.Supp. 461 (W.D. Wash. 1989) 9

TABLE OF AUTHORITIES (continued)

Cases	Page
Peterson v. Chesapeake and Ohio Railroaad Co., 784 F.2d 732 (6th Cir. 1986)	21,22
Norton v. Warner Co., 321 U.S. 565, 64 S. Ct. 747 (1944)	12
Southwest Marine, Inc. v. Gizoni, 502 U.S. ____, 112 S.Ct. 486, 116 L.Ed. 2d 405 (1991)	6
Trinidad Corp. v. American S.S. Owners Mutual P&I Association, 229 F.2d 57 (2nd Cir. 1956), *cert. den.* 351 U.S. 966, 76 S. Ct. 1032(1957)	12
STATUTES	
1 U.S.C. §3	12,19
28 U.S.C. §1257	x
28 U.S.C. §2101(c)	x
33 U.S.C. §902(21)	11
33 U.S.C. §905(b)	*passim*
46 U.S.C. §633	i,3
46 U.S.C. §183 *et seq*	18

TABLE OF AUTHORITIES (continued)

RULES

Rule 13 (4) of the Rules of Court for the U.S. Supreme Court x

OPINIONS BELOW

The opinion of the Louisiana Supreme Court is found at 625 So.2d 1050 (La. 1993) with the decision denying rehearing reported at 627 So.2d 645 (La. 1993). The opinion of the Louisiana Court of Appeal for the Fifth Circuit is found at 620 So.2d 355 (La. App. 5 Cir. 1993) with the opinion denying rehearing reported at 625 So. 2d 1050 (La. App. 5 Cir. 1993). The opinion of the trial court is unreported.

JURISDICTION

The Judgment of the Louisiana Supreme Court was entered on October 15, 1993. A timely petition for rehearing was filed but denied on November 12, 1993. This Petition for Writ of Certiorari is sought within 90 days of the denial of rehearing and thus timely pursuant to 28 U.S.C. §§1257 and 2101(c) and Rule 13(4) of the Rules of Court for the U.S. Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

Article III, § 2, Clause 1 of the United States Constitution provides:

"The judicial Pow er shall extend to all Cases ... arising under ... the Laws of the United States ... [and] of Admiralty and Maritime Jurisdiction."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LOUIS DREYFUS CORPORATION AND
UNITED STATES FIRE INSURANCE COMPANY
PETITIONERS

VERSUS

DAVIS EBANKS, JR., ET. AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

The petitioners, Louis Dreyfus Corporation and United States Fire Insurance Company, respectfully pray that a Writ of Certiorari be granted to review the decision of the Louisiana Supreme Court entered in the above-entitled proceeding on October 15, 1993, rehearing denied November 12, 1993.

STATEMENT OF THE CASE

The facts as found by the trial and appellate courts are set forth in their decisions which are included in the appendix. The facts are undisputed and may be briefly summarized as follows.

Respondent, Davis Ebanks, Jr., was employed by Reserve Marine Enterprises, Inc. (hereinafter referred to as "Reserve") as a crane operator. Reserve entered into a service contract with Louis Dreyfus Corporation (herinafter referred to as "Dreyfus"), which called for Reserve to provide a crane operator to operate a crane which was mounted on the deck of a spud barge. It is the status of the spud barge mounted with the crane that is at issue. Pursuant to the Reserve/Dreyfus contract, Reserve supplied Davis Ebanks, Jr. to operate the crane. For years prior to the alleged accident, Davis Ebanks, Jr. operated the crane. This crane was used in one location almost exclusively to open and close covers on barges coming and going from Dreyfus' neighboring grain elevator. Because of its function, it has come to be known as the "cover stacking station" and will be referred to as such throughout this brief.

The cover stacking station is a spud barge with a crane mounted on it. The crane was secured to the deck of the spud barge by eight two inch by forty-three inch steel bolts, vertically secured to the deck at the fore and aft of a track, allowing the crane to move along the track in order to facilitate the opening and closing of grain barges coming and going from Dreyfus' neighboring grain elevator located on the bank of Mississippi River in Louisiana.

Dreyfus purchased the cover stacking station to permanently secure it to the bank of the Mississippi River by spudding it into the riverbank adjacent to its grain elevator. Accordingly, it was used as a work platform allowing the crane to open and close grain barges coming into the facility. The cover stacking station was exclusively utilized throughout its work life by Dreyfus as a cover

stacking station. During normal operations, the cover stacking station was not afloat; instead, it was suspended above the river bed by spuds. It remained stationary and very seldom was moved. The only time it was moved was to compensate for the rise and fall of the Mississippi River, which occurred approximately twice a year. When it was moved in these few instances, it was only a matter of feet and required the assistance of a tow boat as it had no motor power of its own.

When the cover stacking station was moved, it was not for purposes of navigation or for transporting passengers or cargo across navigable waters. Rather, the sole purpose in moving the structure was to facilitate its further use as a cover stacking station - a permanently secured work platform. The cover stacking station was neither registered with the Coast Guard nor the Army Corps of Engineers. It had no motive power, navigational lights, living quarters, kitchen facilities or other accouterments that would indicate that it was being used as a navigable vessel.

Mr. Ebanks' primary duty as a crane operator was to remove and replace covers on grain barges brought to the cover stacking station. Because of the permanent fixture of the cover stacking station to the river bottom, Mr. Ebanks obviously had no navigational duties whatsoever. Rather, he was simply a crane operator of a crane mounted on a barge that was permanently attached to land such that it was nothing more than an extension of land.

On or about December 30, 1989 while the cover station was permanently secured to the Mississippi River bed with spuds, Mr. Ebanks was in the course and scope of

his employment with Reserve when he allegedly fell on the cover stacking station causing injury.

Suit was filed in the 40th Judicial District Court for the Parish of St. John The Baptist, State of Louisiana, Number 28-178 for Mr. Ebanks' alleged injury under general maritime law, the Jones Act, 46 U. S. C. §633, and §905(b) of the Longshore and Harbor Workers' Compensation Act (herinafter referred to as the "LHWCA"). Petitioners, Louis Dreyfus Corporation and United States Fire Insurance Company, (hereinafter referred to as "USFIC"), the insurer of Dreyfus, answered denying all liability specifically alleging that the cover stacking station was not a vessel for any purpose.

After discovery was completed, petitioners, Louis Dreyfus Corporation and United State Fire Insurance Company filed a motion for summary judgment, claiming, *inter alia*, that the cover stacking station was not a vessel as a matter of law under the general maritime law, the Jones Act, or the LHWCA. After oral argument, the trial judge agreed and in written reasons, held that the cover stacking station was not a vessel as a matter of law under any theory alleged by respondent and entered judgment accordingly. The trial court's written reasons are reproduced in the appendix. On appeal, the Fifth Circuit Court of Appeal for the State of Louisiana, after a review of similar cases, affirmed the judgment of the trial court in favor of petitioners. The Court of Appeal decision is published at 620 So. 2d 355 and is reproduced in the appendix. A petition for writ of certiorari was filed in the Louisiana Supreme Court by Mr. Ebanks which was granted. In a two sentence per curian opinion, the Louisiana Supreme Court

reversed the Summary Judgment decision of the trial court and the affirmance thereof by the appellate court. The Louisiana Supreme Court's decision is published at 625 So. 2d 1050 and is reproduced in the appendix. An application for rehearing by petitioners was denied with one justice voting to grant the rehearing. Petitioners now seek review of the Louisiana Supreme Court's decision in this court by Writ of Certiorari.

REASONS FOR GRANTING WRIT OF CERTIORARI

MAY IT PLEASES THE COURT:

I. Introduction

Petitioners submit the following in support of their Petition for Writ of Certiorari to review the Louisiana Supreme Court's per curiam decision of October 15, 1993. That decision reversed judgments of the trial and appellate courts rendered against the respondent and in favor of, Dreyfus and its insurer, USFIC. Because this Honorable Court has never squarely addressed the issue presented and because the Louisiana Supreme Court's decision on the issue is contrary to on point existing controlling precedent and for other reasons stated herein, the Petition for Writ of Certiorari should be granted.

II. The Only Issue Presented is §905(b) Vessel Status

The sole issue originally presented for review by the Louisiana Supreme Court was whether the trial court properly granted summary judgment against the respondent

concluding that the structure upon which respondent was allegedly injured was not a vessel for purposes of §905(b) of the LHWCA. Although respondent originally brought claims under the Jones Act, general maritime law and §905(b), both the trial and appellate court concluded that the structure upon which the respondent was injured was not a vessel under the standard established for determining vessel status under any of those causes of action. Despite having lost on all three causes of action in both lower courts, respondent only sought review in the Louisiana Supreme Court of the issue concerning vessel status under §905(b). Respondent did not appeal the lower courts' determination that the structure involved was not a vessel for purposes of the Jones Act and/or general maritime law. Consequently, the decisions of the lower courts on those issues are final and were never before the Louisiana Supreme Court for review. Therefore, the sole issue before this Honorable Court is whether the Louisiana Supreme Court's decision of §905(b) vessel status was correct.

Because the only issue presented was §905(b) vessel status, petitioners submit that the Louisiana Supreme Court's reliance, in its per curiam opinion, on the cases of *Southwest Marine, Inc. v. Gizoni*, 502 U.S. ____, 112 S.Ct. 486, 116 L. Ed. 2d 405 (1991) and *Ducote v. V. Keeler & Co., Inc.*, 953 F.2d 1000 (5th Cir. 1992) was inappropriate. Those cases were cited by the Louisiana Supreme Court to support the proposition that "the factual question of whether a floating structure is a vessel is to be decided by the trier of fact." However, these cases do not stand for the proposition they are cited for, and, more importantly, deal with the general issue of Jones Act Seaman status and not §905(b) vessel status.

The *Gizoni, supra* opinion rendered by this Court had nothing to do with vessel status under §905(b). Further, it set no precedent with respect to the propriety of a trial court deciding the issue of vessel status under §905(b) as a matter of law pursuant to a motion for summary judgment. *Gizoni* dealt with the simple and limited question of whether "a maritime worker whose occupation is one of those enumerated in the Longshore and Harbor Workers' Compensation Act...may yet be a 'seaman' within the meaning of the Jones act..." *Gizoni,* 112 S. Ct. at 489.

The *Ducote, supra* case was also cited and relied upon by the Louisiana Supreme Court in the per curiam opinion for the same proposition. However, *Ducote* had nothing to do with a §905(b) vessel status claim, but, rather, involved a Jones Act Seaman status question. Further, the Louisiana Supreme Court selectively quoted from *Ducote* for a proposition not applicable to the issue before it. The Louisiana Supreme Court stated that the trial court's summary judgment decision holding as a matter of law that the structure involved was not a vessel was improper since "even marginal claims are properly left for jury determination." However, when this selective quotation is read in context with the entire passage in *Ducote,* it is apparent that it has no bearing on the §905(b) vessel status issue involved herein. The entirety of the passage from *Ducote* provides:

> A prerequisite to seaman status, and thus to recovery under the Jones Act, is the existence of a vessel. The Jones Act does not define the term 'vessel', and this Court has repeatedly held that the term is incapable of precise definition.

> Because of this imprecision, the question whether a floating structure is a vessel is fact-specific and is usually left to the jury. Furthermore, *because of the policy of providing an expansive remedy for seamen, even marginal claims are properly left for jury determination.*
>
> This Court has held, however, *that summary judgment may be appropriate when there is no evidence from which reasonable persons might draw conflicting inferences on any of the elements of the seaman test.*

Ducote, supra 1002 - 1003. (Emphasis Added). Because the only issue involed in this case was vessel status under §905(b) and has nothing to do with the "policy of providing an expansive remedy for seaman," the *Ducote* case selectively quoted and relied upon by the Louisiana Supreme Court in the per curiam reversal of the lower court decisions was inappropriate.

III. The Question of §905(b) Vessel Status May Be And Was Properly Decided By Summary Judgment.

The Louisiana Supreme Court's per curiam opinion implies that the trier of fact must always determine whether a particular structure is a vessel under §905(b). This is contrary to on point controlling federal court precedent. Federal courts interpreting §905(b) have long recognized that the issue of vessel status is a proper question for the court to decide as a matter of law in a motion for summary judgment when there exists no genuine issue of material fact "from which reasonable persons might

draw conflicting inferences." Moreover, the issue of vessel status under §905(b) is resolvable in a motion for summary judgment when "[t]here is no evidence from which a trier of fact could reasonably conclude that the [structure's] primary purpose, design or business was other than to provide a work platform, and that a transportation function was incidental to that purpose." *Lash v. Ballard Construction Co.*, 707 F.Supp. 461 (W.D. Wash. 1989); *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 rehearing en banc denied 885 F.2d 870 (5th Cir. 1989) (although the district court denied the defendant's summary judgment motion on the §905(b) vessel status question, the Fifth Circuit concluded that the district court should have granted the motion for summary judgment); *Davis v. Cargill, Inc.*, 808 F.2d 361 (5th Cir. 1986) (where the Fifth Circuit affirmed the summary judgment entered by the district court concluding that a structure was not a vessel as a matter of law under §905(b) of the LHWCA). The overwhelming weight of federal court authority deciding vessel status issues under §905(b) hold that the issue may be taken from the jury and decided by the court as a matter of law in a motion for summary judgment in appropriate situations. Because this case was an "appropriate situation" for summary judgment and because the Louisiana Supreme Court improperly applied Jones Act standards of analysis to support its per curiam opinion, this Honorable Court should grant a Writ of Certiorari to review that decision under §905(b) standards.

In the per curiam opinion, the Louisiana Supreme Court mischaracterizes the structure involved by referring to it as "a floating structure." However, in reality, the structure was no more floating than a fixed platform

customarily used in the offshore oil and gas industry. The structure in question was equipped with spuds. These are large metal legs that are jacked down around the perimeter of the structure and into the river bottom converting the structure into a fixed work platform. Obviously, when the spuds are extended, the structure is not floating. It is undisputed that at the time of the alleged accident in question, the structure was spudded down into position, was not floating, and was incapaable of performing any navigational function whatsoever. The overwhelming evidence before the lower courts clearly showed that the structure was purchased to serve as a fixed work platform and in fact served as a fixed work platform for several years prior to the incident in question. During this time, the structure was moved only a couple of times a year to compensate for the changes in the river stages. When it was moved, it was only to facilitate its continued use as a fixed work platform, and not for purposes of transporting cargo, passengers or equipment. Although there was some conflicting evidence about the number of times the structure was moved and for what purpose it was moved, the lower courts clearly concluded that the contrary evidence was so insignificant that a reasonabale juror could not conclude that the structure was a vessel under §905(b). Consequently, the trial court concluded that summary judgment, as authorized by Articles 966 - 969 of the Louisiana Code of Civil Procedure, was proper and dismissed the §905(b) claim.

Contrary to the statements made by the Louisiana Supreme Court, this case does not involve even a marginal §905(b) vessel status claim. While "marginalbleness" may be the yardstick in deciding whether summary judgment is appropriate in Jones Act cases, it is not the criteria or standard by which the issue of §905(b) vessel status is to be

resolved. Under the proper standards of analysis, the structure involved was not a vessel under §905(b) as a matter of law and summary judgment was properly entered so holding. This Honorable Court should issue a Writ of Certiorari to correct the clear error committed by the Louisiana Supreme Court.

IV. Precedent Establishes That The Structure Involved Was Not a §905(b) Vessel.

No controlling precedent from this Court was discovered addressing the §905(b) vessel status issue involved. However, there is a plethora of decisions in the lower federal courts, grappling with the meaning of the term "vessel" in a variety of contexts. These decisions have steadfastly concluded that structures not primarily used to carry cargo or passengers over navigable waters but that are used primarily as work platforms with any movement merely incidental to its continued use as a work platform, are not vessels. The undisputed facts in this case clearly show that the structure involved was not, is not, and cannot be a §905(b) vessel as a matter of law.

The LHWCA contains a definition for the term "vessel" but does not define it. It provides in pertinent part that..."any vessel upon which or in connection with which any person entitled to benefits under this Chapter suffers injury or death arising out of or in the course of his employment...." 33 U.S.C. §902(21).

Because of the lack of guidance provided by the definition in the LHWCA, courts early on cited and relied on the general definition of vessel contained in 1 U.S.C. §3

which states that "[t]he word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. §3. See also, *Norton v. Warner Co.*, 321 U.S. 565, 64 S. Ct. 747 (1944).

This definition appears in Title 1 under the caption "General Provisions." Early courts recognized that this is the definition of "vessel" in the "broadest sense." *Trinidad Corp. v. American S.S. Owners Mutual P&I Association*, 229 F.2d 57 (2nd Cir. 1956), *cert. den.* 351 U.S. 966, 76 S. Ct. 1032(1957). The definition of vessel in 1 U.S.C. §3 came to be known as the "capability test" for determining vessel status. More recent court decisions have recognized that if 1 U.S.C. §3 were literally interpreted and applied, "[n]o doubt the three men in a tub would fit...[the] definition, and one probably could make a convincing case for Jonah inside the whale." *Burks v. American River Transportation.* 679 F.2d 69, 75 (5th Cir. 1982).

In recent cases, the lower federal and state courts have made it abundantly clear that "capability of navigation" alone was insufficient to establish vessel status under §905(b).

In *Davis v. Cargill, Inc., supra*, plaintiff was injured while working as a Longshoreman. Suit was instituted under §905(b). The alleged §905(b) vessel was a "surplus dry cargo barge" that had been converted to a work platform used to sandblast and paint other vessels. The work platform floated on water but was anchored to the riverbed. The hull of the converted barge had also been modified to facilitate its use as a sandblasting and painting work platform. Like the structure in this case, the structure in

Davis was moved occasionally "to accommodate for the changing tide of the river." *Id.* at 362. Despite the fact that the structure in *Davis* was, in the strict sense, "capable" of navigation, the Fifth Circuit affirmed the district court's summary judgment holding that the structure was not a vessel under §905(b) as a matter of law.

Clearly, *Davis* requires the structure to be more than theoretically, "capable" of navigation in order to qualify as a vessel under §905(b). The *Davis* structure floated while in use and could be moved over navigable waters to compensate for tidal changes. Consequently, *Davis* requires the structure to actually be used, to some undefined degree, for transportation in order to be a §905(b) vessel. If the structure's primary use is not transportation, but a work platform, it is not a §905(b) vessel.

In the present case, the structure involved was not being used to transport equipment, supplies, passengers or materials across navigable waters. It was not even floating. It was permanently fixed to the river bottom. Its sole use was a stationary work platform spudded down into the riverbed. It is less of a §905(b) vessel than the *Davis* structure since the *Davis* structure was free floating while the structure in this case was not floating at all. Clearly, under *Davis*, the structure upon which respondent claims to have been injured was not a §905(b) vessel as a matter of law and the Louisiana Supreme Court's reversal of the summary judgment entered by the trial court and affirmed on appeal was erroneous.

Equally controlling the issue involved is *Ducrepont, supra. In Ducrepont,* the Fifth Circuit held that the

district court should have entered summary judgment against the plaintiff holding that the structure involved was not a §905(b) vessel as a matter or law. The structure in *Ducrepont* was a floating cargo barge used as a stationary work platform for performing cleaning and repairing operations on other vessels. It had no motor power, was "firmly moored," was not used for navigation and when moved, required the assistance of a motorized vessel. *Id.* at 396. It was usually moored to the shore by wires. On occasion, "the barge was tugged a short distance from shore due to the level of the water." *Id.* at 394. Despite the obvious fact that the structure was, in the strict sense, "capable of navigation," the Fifth Circuit concluded that it was not a §905(b) vessel as a matter of law. *Id.* The crucial factors for the Fifth Circuit were that the barge involved "was used primarily as a work platform...; it was moored at the time of the accident"; and it was "seldom moved and when moved required the assistance of a motorized vessel." *Id.* at 395 - 96. Moreover, all movements of the barge were to facilitate its further use as a stationary work platform. Additionally, movements of the barge were conducted only a few times a year because of the tidal ranges of the Mississippi River. *Id.* The fact that the structure was originally constructed as a navigable vessel and not a work platform was alone insufficient to make the structure a §905(b) vessel. *Id.* at 394-96.

In *Billiot v. Great Lakes Dredge & Dock Co.*, 1993 U.S. Dist. LEXIS 11560, Civil Action Number 92-2813 "J" (E.D. La. June 29, 1993), plaintiff claimed injury on a crane barge being used to construct a wharf in New Orleans on the Mississippi River. The barge had been leased by plaintiff's employer along with a crane which was driven on to it to do the work. The crane barge was then lashed to two

other barges and towed down the Mississippi River about two miles to the jobsite. One of the other barges had a pile driver on it and one was a utility barge. Two of the three barges had raked bows and the pile driving barge had spuds which were driven into the riverbed when pile driving was being performed. During the work, the barges were moved about every two to three days by use of winches or tug. Plaintiff claimed to have ridden the barges during these moves and allegedly operated the winches used on occasion to move them. The court found that the barges did transport equipment, supplies, cargo and personnel when it was being moved to the next location. Despite the fact that the barges plaintiff worked on were capable of navigation, the district court, relying on *Ducrepont, supra*, concluded that they were not §905(b) vessels as a matter of law. In doing so, the court interpreted *Ducrepont* for the proposition "that work platforms, even if floating, are not...a vessel for purposes of §905(b)." The crucial question to consider, according to the court, was "whether *at the time of the accident* it was being used primarily as a work platform, was securely moored and stationary, and whether any transportation function it performed was merely incidental to its primary purpose of serving as a work platform." *Id.* (Emphasis in original.)

Finally, petitioners direct the court's attention to *Champagne v. M/V COVER STATION*, 508 So.2d 881 (La. App. 5 Cir. 1987). The structure involved in *Champagne* is identical to the structure involved in this case. In *Champagne*, the structure consisted of two barges lashed together with a crane mounted on one. The barges were spudded into the riverbed and used in conjunction with the operation of a grain elevator. The crane barge was used to uncover and cover barges that were making calls to the

neighboring grain elevator. It was a "cover stacking station" identical to the structure at issue in this case. The trial court granted defendant's motion for summary judgment to the effect that the structure was not a §905(b) vessel as a matter of law. On appeal, the appellate court affirmed.

At the time of respondent's alleged accident herein, the structure involved, the cover stacking station, was not afloat, but instead, was firmly and securely fixed to the riverbed with spuds. It was being used only as a stationary work platform to open and close the covers on grain barges coming and going from the neighboring grain elevator. Under any reasonable §905(b) analysis, the structure involved is not a 905(b) vessel as a matter of law.

The uncanny similarities between the structures in *Davis, Ducrepont, Billiot* and *Champagne* and the structure involved herein are many and obvious. There was and is no reasonable basis to distinguish between them. The structure involved herein is actually less of a §905(b) vessel than the structures in *Davis, Ducrepont* and *Billiot*. Under those cases, it was clear error for the Louisiana Supreme Court to leave the question of 905(b) vessel status to the unpredictable, haphazard whims of a jury. The material facts were undisputed. The structure in question, the cover stacking station, is not a 905(b) vessel as a matter of law. This Court should grant a Writ of Certiorari to correct the error committed by the Louisiana Supreme Court by reinstating the decisions of the trial and appellate courts.

There was no justifiable reason or basis for the Louisiana Supreme Court to disturb what was already correctly

decided by the two lower courts. The lower courts' conclusion that the structure involved was not a §905(b) vessel as a matter of law was imminently correct and should not have been upset by the Louisiana Supreme Court. There is simply no reasonable evidentiary basis to justify a remand to the trial court for a full blown trial resulting in the needless expenditure of time and expense by all parties. The whole purpose of summary judgment procedure is to reduce the cost and expense of needless litigation by allowing resolution at an early stage of matters not seriously disputed. The Louisiana Supreme Court's action clearly violates the purposes and spirit underlying summary judgment procedure. Accordingly, this Honorable Court should grant a Writ of Certiorari to review the Louisiana Supreme Court's decision using proper §905(b) standards of analysis as set forth in *Davis, Ducrepont, Billiot* and *Champagne.* After doing so, it will be apparent to this Court that the Louisiana Supreme Court's per curiam reversal of the lower courts' decisions was improper.

The decisions in *Davis, Ducrepont, Billiot* and *Champagne* are well supported by longstanding precedent from this Court.

In *Cope v. Vallette Dry Dock Co.,* 119 U.S. 625, 7 S.Ct. 336, 30 L.Ed. 501 (1887), this Court concluded that a floating dry-dock fixed to the shore with cables was not a ship or vessel and was not, therefore, the subject of maritime salvage. In reaching this conclusion, this Court stated:

> A fixed structure, such as this dry-dock, is not used for the purpose of navigation, is not a subject

> of salvage service, any more than a wharf or warehouse when projecting into or upon the water. The fact that it floats on the water does not make it a ship or vessel.

119 U.S. at 627, 7 S.Ct. at 336. This Court further stated that the terms "ships and vessels" include, "in a very broad sense, ... all navigable structures *intended for transportation*" but that these terms do not include "a dry-dock, a floating bridge or meeting house, permanently moored or attached to a wharf." *Id.* (Emphasis Added).

Clearly, under *Cope*, this Court requires the structure to be intended and actually used for transportation before it can be defined a "ship or vessel." When the structure is not intended and is not used for transportation and is more or less permanently attached to land, it is not a "vessel" as a matter of law.

In *Evansville and Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 46 S. Ct. 379, 70 L.Ed. 805 (1926) this Court was asked to decide whether a structure referred to as a "wharfboat" was a "vessel" for purposes of the Limitation of Liability Act. 46 U.S.C. §183 *et seq.* The structure involved was originally built and used as a navigational vessel engaged in transportation. At the time in question, it was being used by its owner as an "office, warehouse, and wharf..." *Id.* at 380. However, "[e]ach winter it was towed" to a different river harbor "to protect it from ice." *Id.* While in use as an office, warehouse and wharf, "it was secured to the shore by four or five cables, and remained at the same point, except when moved to conform to the stage of the river." *Id.* It had no means of pro-

pulsion and was not inspected by the government. In addition to having office and living quarters, the wharfboat "was used to transfer freight between steamboats and land and from one steamboat to another." *Id.* It was also used to store some of the goods handled. The wharfboat charged for services and made money in its use as a storage and handling facility "and not of transportation." *Id.* In deciding that the wharfboat was not a vessel, this Court found the following factors decisive:

1) "It was an aid to river traffic but it was not used to carry freight from one place to the other";

2) "It was not practically capable of being used as a means of transportation."

3) "It served...as an office, warehouse, and wharf, and was not taken from place to place."

4) "It had water, electrical and phone connections";

5) "It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to land."

6) "It did not encounter perils of navigation to which craft for transportation are exposed."

Id. at 380. Importantly, this Court cited 1 U.S.C. §3's definition of vessel in the case and apparently felt that the wharfboat did not satisfy the requirements.

Like the wharfboat in *Evansville*, the cover stacking station was an aid to river traffic but was not itself used to carry freight from one place to the other. It was not practically capable of being used as a means for transportation since it was spudded to the riverbed, had a crane mounted on its deck, had no navigational lights or motor power. It served as a cover stacking station in one location - it was not taken from place to place to perform its task. The cover stacking station performed no task that could not have been performed by a land based facility and it did not encounter the perils of navigation which is common to "vessels." Finally, whatever monies were earned by the cover stacking station were not related to any transportation activities. Consequently the cover stacking station is not a vessel as a matter of law and this Court should grant a Writ of Certiorari and reverse the Louisiana Supreme Court's decision concluding otherwise.

The *Cope* and *Evansville* decisions clearly support the proposition that mere capability is not the test for determining vessel status. Rather, there must be a showing that the structure engages in or is actually used as a means of transportation of passengers or materials accross navigable waters. If the structure serves primarily as a fixed work platform, it is not a vessel.

V. A Vessel Is A Vessel For All Purposes

Vessel status questions have arisen in almost all federal circuits mainly in the context of a Jones Act case. Petitioners submit there should be no difference between the meaning of the term "vessel" for §905(b) and Jones Act purposes. The Jones Act requires the vessel to be "in

navigation." Petitioners submit that the "vessel in navigation" requirement should also apply to §905(b) vessel status questions. Otherwise, this Court will foster the anomaly of providing potential Jones Act seaman with less rights than a longshoreman. A structure that may not pass muster under Jones Act analysis may satisfy more lenient requirements of vessel status under §905(b). Petitioners submit that this is an unjustified and undesirable situation. There should be one meaning and definition for the term "vessel" whether one is analyzing a structure for Jones Act or §905(b) purposes. A single meaning for the term "vessel" will serve the goal of uniformity underlying maritime law and allow parties to better predict the costs of doing business, the risk of exposure to lawsuits based on multiple theories and allow parties to more properly insure those risks. Moreover, a uniform test would reduce litigation costs discouraging frivolous vessel status claims and facilitate resolution of vessel questions by motion practice.

A review of cases from almost all federal circuits indicates a uniform theme - in order for a structure to be considered a vessel, its primary use and purpose or business must be navigation or transportation. If the structure's primary use and purpose is non-navigational or non-transportational, then it should not be considered a vessel for any purpose. This test for vessel status comports with the common sense understanding of the term vessel as being an object that is used to transport passengers, material, cargo or equipment over water. See, *DiGiovanni v. Travlor Bros., Inc.*, 1992 A.M.C. 1521 (1st Cir. 1992); *Buccellato v. City of New York*, 808 F.Supp. 967 (E.D.N.Y. 1992); *Griffith v. Wheeling Pittsburg Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975) *cert. den.* 423 U.S. 1054 (1975); *Peterson*

v. Chesapeake and Ohio Railroad Co., 784 F.2d 732 (6th Cir. 1986); *Johnson v. Beasley Const. Co.*, 742 F.2d 1054 (7th Cir. 1984) *cert. den.* 469 U.S. 1211 (1985); *Cathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992); *Hurst v. Pilings and Structures, Inc.* 896 F.2d 504 (11th Cir. 1990).

Petitioners make one final point to this Court in closing. Neither Petitioners nor any other defendant is attempting to foreclose a plaintiff such as Ebanks, or one similarly situated, from available causes of action. Unquestionably, even if the structure is not a §905(b) vessel, respondent still would have had state law claims for negligence and strict liability.

CONCLUSION

The structure involved in this case, the cover stacking station, is not a §905(b) vessel as a matter of law. The trial court and court of appeal correctly decided the issue. The Louisiana Supreme Court's per curiam reversal of the lower court's decision is contrary to controlling federal court precedent. This Court should grant a Writ of Certiorari to correct the error of the Louisiana Supreme Court.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the foregoing has been mailed to all counsel by placing same in the United States mail, postage prepaid, and properly addressed this 10th day of February, 1994.

FRANCIS A. COURTENAY, JR.
DONALD J. VOLPI, JR.
ROBERT P. KEMP

APPENDIX A

DAVIS EBANKS, JR. and LISA EBANKS	40TH JUDICIAL DISTRICT COURT PARISH OF ST. JOHN THE BAPTIST
V.	STATE OF LOUISIANA DIVISION "B"
RESERVE MARINE ENTERPRISES, INC.	NO. 28,178

FILED: **December 15, 1992** DY. CLERK: **Lori Buche Coles**

JUDGMENT ON MOTION FOR SUMMARY JUDGMENT

The parties having agreed at the November 25 in camera hearing on defendant Louis Dreyfus Corporation's August 31 "Peremptory exception of no cause of action" that it should be treated and now decided as a motion for summary judgment (as it was treated by plaintiffs Davis Ebanks, Jr. and Lisa Ebanks, in their November 20 Memorandum in Opposition, p. 4, arguing that vessel status is not determinable by motion for summary judgment; and also by third party defendant United States Fire Insurance Company in its November 20 "Memorandum in Support of ...Motion for Summary Judgment"); and the Court concluding that there is no genuine issue as to material fact, and that defendant is entitled to judgment as a matter of law,

IT IS ORDERED, ADJUDGED AND DECREED that there is judgment in favor of defendant Louis Dreyfus Corporation and against plaintiffs Davis Ebanks, Jr. and Lisa Ebanks, dismissing plaintiffs' action as against Louis Dreyfus Corporation.

JUDGMENT READ, RENDERED AND SIGNED this 15th day of December, 1992.

/s/ William V. Redmann

WILLIAM V. REDMANN,
JUDGE PRO TEM

SERVE ALL PARTIES:

APPENDIX B

DAVIS EBANKS, JR. et al.	40TH JUDICIAL DISTRICT COURT PARISH OF ST. JOHN THE BAPTIST
versus	STATE OF LOUISIANA
RESERVE MARINE ENTERPRISES et al	NO. 28-178, DIVISION B

REASONS FOR SUMMARY JUDGMENT

There is no genuine dispute as to the material facts on the issue of whether the barge in this December 30, 1989 is a vessel for purposes of the general maritime law or the LHWCA, § 905(b).

The barge was bought August 18, 1987 with crane and spuds, to be used for, and was used for, removing and replacing grain barge covers, and storing those covers during the grain barges' loading or unloading at mover's riverside grain elevator. The crane barge was anchored or moored in its location adjacent to the river bank by driving its spuds into the river bed. Twice a year in that use the crane barge was moved and spudded to the bed a few feet nearer to (or farther from) the bank of the river, to accommodate the rise or fall of the river level. At the time of the accident in which plaintiff was injured, the barge was employed in this grain-barge use and was thus spudded to the bed.

The crane was also used occasionally for repair of movers's dock and certain of mover's dockside loading equipment. To accommodate the crane's use for such purposes, the barge was moved short distances from time to time.

The barge thus did have transportation capability once unspudded. (When mover bought it two years earlier, it was transported from Texas to mover's grain facility by intracoastal waterway.)

I conclude, nevertheless, that mover's barge, given the undisputed facts of its quasi-permanent spud-anchoring or -mooring, was not a vessel in navigation for general maritime law purposes (nor for Jones Act purposes, ignoring mover's not being plaintiff's employer; plaintiff did file a Jones Act claim against his employer but counsel advise that claim is now "gone" from this litigation). *Watkins v. Pentzien, Inc.*, 660 F.2d 604 (5 Cir. 1981), *cert. denied* 456 U.S. 944 (1982).

Nor, in view of the crane barge's firm, quasi-permanent spud-anchoring or -mooring, was that barge a vessel for purposes of LHWCA § 905(b). *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5 Cir. 1989).

Orgeron v. Avondale Shipyards, Inc., 561 So.2d 38 (La. 1990), distinguishes itself from *Ducrepont*, and in doing so distinguishes itself from this case, despite plaintiff's contention that *Orgeron* would hold this crane-barge a § 905(b) vessel:

> *Ducrepont* held that a barge is not a § 905(b) vessel when it is firmly moored, seldom moved, not used for navigation and in use as a dry dock or stationary work platform....
>
> In *Ducrepont*, the stationary work platform was firmly moored and seldom moved. These barges [in *Orgeron*, "floating work platforms which also moved men and materials ... [and] transported workers' tools and equipment," 561 So.2d at 40] were not stationary and were frequently moved. In fact, the injury occurred when the barges drifted apart....

561 So.2d at 43; bracketed materials inserted by this writer.

Ducrepont rather than *Orgeron* controls the present factual situation, in which there is no genuine dispute of material fact, but only a dispute over the conclusions to be drawn from those not genuinely disputed facts.

Edgard, Louisiana, December 30, 1992.

/s/ William V. Redmann
JUDGE PRO TEMPORE

APPENDIX C

DAVIS EBANKS, JR. AND LISA EBANKS	:	NO. 93-CA-154
	:	FIFTH CIRCUIT
VERSUS		
	:	COURT OF APPEAL
RESERVE MARINE ENTERPRISES, INC.	:	STATE OF LOUISIANA

APPEAL FROM THE 40th JUDICIAL DISTRICT
COURT FOR THE PARISH OF
ST. JOHN THE BAPTIST, NUMBER 28-178
HONORABLE WILLIAM V. REDMANN,
JUDGE PRO TEM

: : :

EDWARD A. DUFRESNE, JR.

JUDGE

MAY 25 1993

: : :

(Panel composed of Judges Fred S. Bowes, Edward A. Dufresne, Jr. and Thomas C. Wicker, Jr.)

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AFFIRMED

This is an appeal by Davis Ebanks, Jr., plaintiff-appellant, from a summary judgment dismissing his suit for damages under general maritime law, the Jones Act, and section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). Because we agree with the trial judge's conclusion that the barge upon which Ebanks was allegedly injured was not, as a matter of law, a *vessel*, and thus that the threshold requirement for recovery under the above laws was not met, we affirm the judgment.

The uncontested facts upon which the trial judge based his judgment are these. Davis Ebanks, Jr. was employed as a crane operator by Reserve Enterprises, Inc. Under a service agreement with Louis Dreyfus Corporation, Reserve assigned Ebanks to operate a crane mounted on a barge. This crane barge was owned by Dreyfus and used as a cover station in its grain shipping operation on the Mississippi River. The primary function of the crane barge was to remove the covers of grain barges during unloading operations. To accomplish this task, the crane barge was placed near the river bank and two spuds were driven into the river bottom to hold it in place. The grain barges were then brought along side and their covers were lifted off by the crane and stored on the crane barge deck until loading or unloading was completed, at which time the covers were replaced by the crane. The only time that the crane barge was moved while in this routine service was when the level of the river fluctuated. When the river fell, the spuds would be pulled up by the crane and the barge would be moved by a tug boat further out into the stream, where the spuds would then again be driven into the bed. When the river rose the same procedure would be followed, but moving the barge toward the shore.

The barge had no kitchen, living quarters, navigation lights, or any means of self-propulsion. Its attachment to the shore was by way of a cat-walk by which workers would reach it.

It was also shown that on a few occasions during the year proceeding plaintiff's alleged injury, the crane barge was unmoored and towed to other locations up to 1500 feet from its usual position, where it was then used for other incidental tasks. On one of these occasions it was used for perhaps two weeks to remove old decking from a wharf. On another, it was used to lift an engine out of a tug boat, place it on shore, and then lift a new engine into the tug. On yet another, it was used to lift a gangway which had apparently fallen on a tug boat. Finally, on a few occasions it was used to pick up assorted motors, winches and pumps off the shore and place them on various other vessels.

A succinct summary of the law applicable here is found in *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393, 395 (5th Cir. 1989), where the court stated that:

> To qualify as a seaman under the Jones Act or General Maritime Law the plaintiff must show that he was permanently assigned to or performed a substantial part of his work aboard a vessel. Similarly, for purposes of a 905(b) vessel negligence claim under the LHWCA, a plaintiff must show that he was injured as a result of the negligence of a vessel. (citations omitted)

Therefore, for plaintiff here to prevail under any of the above theories it must be established that a "vessel" was involved in his alleged injury.

As to the Jones Act claim, it is settled law that dry docks and analogous structures whose primary purpose is to provide a work platform, even if they are afloat, are not Jones Act vessels as a matter of law, *Ducrepont, supra.* In making this determination, the courts have generally looked to three factors, i.e. 1) was the structure constructed and used primarily as a work platform; 2) was it moored at the time of the accident; and 3) although capable of movement and sometimes moved in normal operations, was any transportation function merely incidental to its primary purpose of serving as a work platform, *Bernard v. Binnings Construction Co., Inc.*, 741 F.2d 824 (5th Cir. 1984). Further, in *Ducrepont, supra,* the court emphasized that even where a structure had not been built as a work platform, it should be considered as such where that is its present use and the other above criteria are also met.

In the present matter, it is clear that the crane barge is not a Jones Act vessel. There is not question that the structure was being used primarily as a stationary work platform, and that it was moored to the river bottom, via the spuds, at the time of plaintiff's injury. Third, although the barge was movable, and was sometimes moved, the only arguable transportation function which it served was to occasionally pick up various pieces of equipment from the bank and place them on floating vessels. Such use was clearly incidental to its primary purpose of serving as a moored cover station.

As to the 905(b) claim, "as a matter of law, a floating dry dock is not a vessel when it is moored and in use as a dry dock," *Davis v. Cargill, Inc.*, 808 F.2d 361, 362 (5th Cir. 1986). In *Davis,* the structure involved was originally a

navigable cargo barge which had been converted to a work platform. It was anchored into the river bed and moved once or twice a year to compensate for fluctuations in the water level, and was incapable of being moved without assistance of a tug boat. In *Ducrepont, supra*, the structure was also originally a navigable barge which had been converted to a work platform. It was moored to the shore by wires, and was on occasion moved by tugboat to adjust to fluctuations in the water level. In both the above cases, the structure was found not to be a vessel for 905(b) purposes.

In the present case, the crane barge at issue is almost indistinguishable from the structures in the above cases. Plaintiff urges to the contrary, that because the barge may have been re-spudded some 35 to 40 times (which number he asserts by way of affidavit) to adjust for changes in the water level during one year, this case is distinguishable from *Cargill* and *Ducrepont,* where movement was "twice a year" or occasionally. In our opinion the issue is not the frequency of the re-spudding, but rather its purpose, as here, to keep the barge afloat at a proper water depth for its purposes. To rule otherwise would mean that structures on frequently fluctuating rivers would be deemed vessels, while similar ones on more placid waters would be deemed non-vessels. We decline to countenance such an anomaly in the law, and therefore reject plaintiff's argument.

The more difficult question is whether the occasional movement and uses of the crane barge for purposes unrelated to its primary function as a cover station would transform it into a vessel under section 905(b). In *Orgeron v. Avondale Shipyards, Inc.,* 561 So.2d 38 (La. 1990), the court stated that in the United States Fifth Circuit, the test

for vessel status in 905(b) actions is the capability test in 1 U.S.C. § 3, as modified in *Ducrepont, supra*, and cases there cited. A vessel as defined in 1 U.S.C. § 3, "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Our understanding of *Ducrepont*, and related cases, is that a structure, although built and used originally as a 905(b) vessel, may be deemed a non-vessel when its primary use becomes that of a work platform which is firmly moored and seldom moved. Thus, the phrase "capable of being used, as a means of transportation on water" has been interpreted in the context of the regular use to which a structure is put, rather than that of some use of which it might theoretically be capable. It has further been interpreted in the context of the structure's use at the time of the injury.

In the present case, there is no dispute that plaintiff's alleged injury occurred while the barge was spudded into the river bottom in its customary location, and while it was functioning as a stationary work platform or cover station. In these circumstances we are unable to distinguish this matter from *Ducrepont, supra*, and we must therefore affirm the trial judge's conclusion that the crane barge was not a vessel for 905(b) purposes.

As shown above, there is no dispute as to any material fact going to the issue of whether the crane barge is or is not a vessel. All of the facts establish that it is not, and plaintiff has thus failed to establish a threshold requirement for application of any of the laws under which he seeks recovery. We therefore affirm the judgment of the district court in favor of defendants.

AFFIRMED

APPENDIX D

SUPREME COURT OF LOUISIANA

NO. 93-C-1707

DAVIS EBANKS, JR. and LISA EBANKS

versus

RESERVE MARINE ENTERPRISES, INC. ET AL

PER CURIAM.

Writ granted. The factual question of whether a floating structure is a vessel is to be decided by the trier of fact. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. ____, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991); *Ducote v. V. Keeler & Co., Inc.*, 953 F.2d 1000 (5th Cir. 1992); *Orgeron v. Avondale Shipyards, Inc.*, 561 So.2d 38 (La. 1990). Since "even marginal claims are properly left for jury determination" (*Ducote*, 953 F.2d at 1002), the trial court erred in holding that this crane barge was not a vessel as a matter of law. The summary judgment is reversed and the case remanded for trial on the merits.

REVERSED AND REMANDED.

APPENDIX E

THE SUPREME COURT OF THE STATE OF LOUISIANA

DAVIS EBANKS, JR. AND
LISA EBANKS

VS. NO. 93-C-1707

RESERVE MARINE ENTERPRISES, INC.

- - - - -

IN RE: Louis Dreyfus Corporation and United States Fire Insurance Co., applying for Rehearing of this Court's Order dated October 15, 1993; to the Court of Appeal, Fifth Circuit, No. 93-CA-0154; Parish of St. John the Baptist, 40th Judicial District Court Div. "B", No. 28,178.

- - - - -

November 12, 1993

Rehearing denied.

PFC
WFM
JCW
PH
CDK
ROO

LEMMON, J., would grant rehearing.

DENNIS, J., not on panel.

Supreme Court of Louisiana
November 12, 1993